SUPREME COURT, U. S

In the Supreme Court of the United States

October Term, 1971

No. 71-956

BILLIE K. FREEMAN; Guardian of TERRY FREEMAN; VYRON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

vs.

ALMON FLAKE, *et als.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for Respondent in Opposition

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OPINIONS BELOW

The opinion of the United States District Court for the District of Utah is reported at 320 F. Supp. 531 and is set forth in the Appendix at pps. A-9 to A-26.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 448 F.2d 258 and is set forth in the Appendix at pps. A-1 to A-8.

QUESTIONS PRESENTED

May the State constitutionally adopt and enforce rules limiting the length of school boys' hair when reasonably calculated to preserve discipline, decorum, safety and otherwise to enhance the educational process in public schools?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the constitutional provisions set forth in the Petition for Certiorari, this case also involves:

Constitution of Utah, Article III, ¶4:

> "The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control".

53-6-20, Utah Code Annotated, 1953, (Vol. 5B, p. 262):

> "Further powers of Boards of Education.—Every Board of Education shall have power and authority to . . . make and enforce all needful rules and regulations for the control and management of the public schools of the District".

Policy Manual of Davis County School District, § 3, Paragraph 31 "School Dress, Grooming and Appearance":

"All students shall maintain their hair in a clean and well-washed manner and male students shall comb and wear their hair so that it does not hang below the collar line in the back nor hang over the ears on the side and their hair must be above the eyebrows in the front. Male students shall be clean-shaven and their sideburns shall not be lower than the bottom of the ear and mustaches properly trimmed". (A-17)

STATEMENT OF THE CASE

Freeman vs. Flake actually involves three cases filed separately in the United States District Court for the District of Utah, two involving high school students and one a junior high school student, from the Davis County School District and the Alpine School District. The cases were consolidated for trial before the Honorable A. Sherman Christensen, District Judge.

After three days of trial, Judge Christensen ruled: ". . . [T]hat the enforcement of the regulations by suspension pending compliance in the context of these cases does not violate either the students' or the parents' fundamental rights of privacy, does not deny freedom of expression guaranteed and protected by the First Amendment, does not violate either procedural or substantive due process or the Equal Protection Clause of the Fourteenth Amendment, that the regulations are not unconstitutionally vague, or overly broad, and that there is no basis for enjoining their application and enforcement in the schools involved here under existing circumstances" (A-25).

In reaching this decision Judge Christensen found:

1. That the State in the area of regulation of grooming and in connection with its broader, but related functions, is advancing a vital State interest (A-23).

2. That the evidence clearly shows that the regulations were adopted after careful consideration and in the intended best interest of the educational process; that they were based upon reasonable findings supported by the evidence tending to indicate to the reasonable mind that such regulations would minimize disruption and distriction in the school, promote order and safety, redirect the attention of students from an obsession with, or reaction against, mere hair length—as an achievement or a counter-achievement, would direct attention to more productive activities and would minimize the danger of distraction from educational pursuit (A-23).

3. That those directly connected with the schools and school districts in question were in substantial agreement that the grooming code in question was beneficial, if not essential, and they have the broad support not only of the parents and administrators, but of the students in the schools (A-15).

4. That the regulation as to hair is explicit and, therefore, not void on its face for uncertainty and it is not overly broad (A-21).

5. That the evidence and final statement of Plaintiff's Counsel shows that there is no question as to procedural due process (A-20).

6. That the main reason assigned by the Plaintiffs for resistance to the regulation was that they

"wanted" to have longer hair, they "liked" it and they thought it was their "right" and they were not expressing any form of symbolic speech with which special sensitivity beyond ordinary respect for constitutional limitations must be protected under the First Amendment (A-21).

7. That long hair creates negative attitudes, if not opposition, from the majority of students, that those with long hair tend to isolate themselves from the mainstream of student activity and long hair in the climate of the time is disruptive within the schools in question of proper school discipline and the learning process to an extent and that there is a correlation between long hair and improper grooming aside from hair (A-15).

8. That between close-shaven hair and the limits of the regulation there is a considerable leeway for individual taste (including what may be regarded by many as long hair for male students) (A-16).

The United States Court of Appeals for the Tenth Circuit affirmed, 448 F. 2d, 258. In doing so the Court stated that the schoolboards offered justification for the regulations and that no claim was made of any racial or religious discrimination and that there was nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns (A-3).

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

1. Factual Distinctions Resolve the Apparent Conflict of Decisions Concerned with Hair Length of Children in Public Schools.

The United States Courts of Appeals from eight separate Circuits have now ruled on the question of public school regulations limiting the length of hair of school boys. These cases are:

Ferrell vs. Dallas Independent School District, 392 F. 2d 697 (CA 5, 1968), cert. den. 393 U.S. 856 (1968).

Breen vs. Kahl, 419 F. 2d 1034 (CA 7, 1969), cert. den. 398 U.S. 937 (1970).

Jackson vs. Dorrier, 424 F. 2d 213 (CA 6, 1970), cert. den. 400 U.S. 850 (1970).

Richards vs. Thurston, 424 F. 2d 1281 (CA 1, 1970).

King vs. Saddleback Junior College, 445 F.2d 932 (CA 9, 1971), cert. den. January 17, 1972, Case No. 71-498.

Freeman vs. Flake, 448 F. 2d 258 (CA 10, 1971) Appendix, pp. A-9-A-29.

Bishop vs. Colaw, 450 F. 2d 1069 (CA 8, 1971).

Massie v. Henry, (CA 4, No. 15, 325, February 2, 1972).

The Courts of Appeals for the Fifth, Sixth, Ninth and Tenth Circuits upheld the school regulations in the *Ferrell, Jackson, King* and *Freeman* cases and four Circuits, the First, Fourth, Seventh, and Eighth, have refused to uphold the school regulations, those decisions being in the *Richards, Breen, Bishop*, and *Massie* cases.

Under these circumstances, there is an apparent conflict in the decisions among the various Circuits; however, these apparent conflicts can be reconciled on the facts when the cases are analyzed and distinguished.

In *Richards*, each side relied on the failure of the other to sustain its burden of proof. The Court recognized that school officials have the authority to take appropriate action in facing a problem of discipline or distraction but held that in the absence of an inherent, self-evident justification on the face of the rule, the burden is on the school to show justification for the rule and since no justification had been offered at the time of the trial, the rule was not upheld.

A similar analysis holds true in the *Breen case*. In that case, the Court relied upon the finding of the trial Court that there was no showing of any possible justification for the regulation (419 F.2d 1034, 1037). The Court found that the failure of the school to sustain its burden of substantial justification for the rule distinguished *Breen* from the *Ferrell* case which upheld the school. *Breen*, therefore, distinguishes itself from *Ferrell* and the other Circuits upholding school hair regulations.

Similarly, even while refusing to uphold a hair regulation, the *Bishop* case recognized that in those Circiuts which have upheld them, the schools had demonstrated the reasonableness of the regulations by showing violations had, in fact, caused school disruptions. The school failed to make such a showing in *Bishop* and the regulation was not upheld.

The *Massie* case reached a similar result in finding the school had not met its burden of justifying the rule.

In all of the cases from the Fifth, Sixth, Ninth, and Tenth Circiuts the Courts found that there was justification for the rule. In *Freeman* the Court found evidence of actual disrûption and other justifications for the rule. Even in the cases not upholding the rules, the Courts found that while the schools had the constitutional authority to adopt such rules, that they had not met their burden of showing justification for them as they had done in the cases upholding the rules in the other Circuits. No Circuit has ruled that the schools do not have the Constitutional authority to adopt and enforce such rules. It was basically these factual differences which brought about the different results. The Circuits are all in substantial accord on the law and there is, therefore, no significant conflict among the Circuits which would indicate the necessity of granting the Petition for Certiorari.

2. The Courts Should Exercise Care and Restraint in Intervening in the Operation of Public School Systems.

The Constitution of Utah provides in Article III, ¶4 that the Legislature shall make laws for the establishment and maintenance of a public school system. In following this Constitutional mandate the Legislature has provided that "Every Board of Education shall have power and authority to . . . make and enforce all needful rules and regulations for the control and management of the public schools of the district." (53-6-20, Utah Code Annotated, 1953.)

The trial court found that the regulations were based upon reasonable findings of the school administra-

tors and that such findings were supported by the evidence at the trial (A-23).

The Court of Appeals stated that there was nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns (A-3).

Under these circumstances, the Court should not substitute its judgment for the expertise, judgment, and years of experience of school administrators and elected boards of education. *Epperson vs. Arkansas*, 393 U. S. 97; *Tinker vs. Des Moines Independent Community School District*, 393 U. S. 503; *Ferguson vs. Skrupa*, 372 U. S. 726, 730; *Starkey vs. Board of Education*, 14 Utah 2d 227, 381 P. 2d 718.

In *Epperson* the Court stated at 393 U. S. 104:

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly* and *sharply* implicate *basic* constitutional values." [Italics added]

In *Tinker* it was stated at 393 U. S. 507:

> "[The] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with *fundamental* constitutional safeguards to prescribe and control conduct in the schools." [Italics added]

When a few school boys wear their hair in violation of the grooming codes adopted in the best interests of the school for no other reason than because they "like" it or "want" it that long while at the same time specifically disclaiming the expression or dramatization of any

moral, sociological, political, religious or idealogical viewpoint, it is submitted that such conduct does not *directly* and *sharply* implicate *basic* or *fundamental* constitutional values and that the authority to resolve this and similar problems arising in the daily operation of the schools should remain vested in school officials.

3. The Hair Regulation Does Not Violate the Constitutional Rights of Petitioners.

Petitioners infer that the hair styles involved in this case may be the symbol of a youth culture which has challenged the established order. The students themselves specifically disclaimed this and the District Court so found (A-21). The wearing of long hair obviously does not involve pure speech nor does it involve symbolic speech under the First Amendment unless there is some intention to communicate a thought or contribute to the "storehouse of ideas" through conduct rather than words. Even so, not all symbolic speech or conduct is entitled to First Amendment protection as was recognized in *United States vs. O'Brien*, 391 U. S. 367:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct contends thereby to express an idea."

As indicated, the students stated in the trial that they did not intend to express any idea whatsoever by wearing long hair and such conduct does not, therefore, involve a *basic* or *fundamental* constitutional right entitled to First Amendment protection.

The hair regulation in question is reasonable and the

schools showed justification for it. It does not touch upon behavior involving "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", (*Powell vs. Alabama*, 287 U. S. 45, 67).

The length of hair of school boys in public schools is, therefore, the proper subject of reasonable regulation and the school rules in question do not violate the provisions of the First, Fourth, Ninth or Fourteenth Amendments to the Constitution of the United States.

4. The Constitutional Rights of Children Are Not Coextensive with the Constitutional Rights of Adults.

Children do not occupy the same position as adults in our society, *May vs. Anderson*, 345 U. S. 528, and while school children are not devoid of constitutional rights, *Tinker*, supra, it must be recognized that the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, *Prince vs. Massachusetts*, 321 U. S. 158; *Ginsberg vs. New York*, 390 U. S. 629.

These principles are of particular importance within a school system where many children are in close proximity. There is a need to establish and enforce reasonable rules and regulations to provide an environment conducive to the learning process, since teaching of children is the primary purpose for which the State establishes and operates schools.

It is within this context that the necessity for granting certiorari should be evaluated. Such evaluation mitigates against granting certiorari and in favor of the

proposition that the Court should refrain from interfering in the administration of the public schools except as to matters directly and sharply implicating basic constitutional values which this case does not.

5. Uniformity of Appearance Is Not the Purpose or Effect of the Rule.

As found by the trial court, the rule in question does not impose uniformity of appearance upon the school children, for there is a wide range of latitude between closely shaven hair and the limits of the rule which would provide for individual expression including what many would consider long hair (A-16). The rule also allows for individual expression by providing that sideburns may be worn to the bottom of the earlobe and neatly trimmed mustaches may be worn. What the rule does attempt to accomplish, rather than uniformity of appearance, is to help create a proper atmosphere and environment conducive to the learning process.

CONCLUSION

The opinions of the various Circuits which have ruled on these matters are in substantial accord on the law, although different results have been reached primarily on the facts. The Circuits are therefore not divided to the extent that certiorari should be granted for clarification. The hair regulation in question is reasonable and proper and does not involve or implicate basic or fundamental constitutional rights and under these

circumstances, the responsibility for the administration of the schools should be left with the school officials and the petition for certiorari should be denied.

Respectfully submitted,

William H. King,
Felshaw King

Attorneys for Respondents

Opinions of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1007

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN, *et al.*,

Plaintiffs-Appellants,

v.

ALMON FLAKE, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. NOS. NC 36-70, 37-70, 249-70)

No. 71-1051

AL WHITE, a Minor, by his Father, V. T. WHITE,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D. C. NO. 8485)

No. 71-1072

GREGORY A. CRANSTON and RANDALL J. CRANSTON, Minors, by and through their Natural Guardian, WALTER N. CRANSTON, *Plaintiffs-Appellants,*

v.

EAST OTERO SCHOOL DISTRICT R-1, *et al.*, *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. C. NO. C-3550)

JAMES N. BARBER (Richard M. Day on the brief), *for Plaintiffs-Appellants in* No. 71-1007.

FELSHAW KING (William H. King on the brief), *for Defendants-Appellees in* No. 71-1007.

JOEL M. GORA and DAN MCKINNON, III (Melvin L. Wulf and Paul A. Phillips on the brief), *for Plaintiff-Appellee in* No. 71-1051.

MACK EASLEY of Easley & Reynolds, *for Defendants-Appellants in* No. 71-1051.

STEPHEN F. WILLIAMS, *for Plaintiffs-Appellants in* No. 71-1072.

BENJAMIN L. CRAIG (Peter M. Eggleston and Ralph N. Wadleigh on the brief), *for Defendants-Appellees in* No. 71-1072.

Before:

PHILLIPS, BREITENSTEIN and HILL, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

Regulation of hair styles of male students in state public schools is becoming a matter of major concern to

federal courts if one is to judge by the ever-increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented, in the cases now before us. We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures.

We have three cases, one each from Utah, New Mexico, and Colorado. In each, one or more students were suspended for violation of the school regulation on the length of hair of male students. Jurisdiction is asserted under 28 U.S.C. § 1343 and the claims are based on § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983. Although the regulations differ in language, they essentially require that the hair should not hang below the collar line in the back, the ears on the side, or the eyebrows in front. The evidence need not be detailed. It is remarkably similar in each case. The students desired to express their individualities and the school boards offered justification for the regulations. No claim is made of any racial or religious discrimination. We find nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns. The federal district courts in Utah and Colorado upheld the regulations and in New Mexico the regulation was rejected as infringing on constitutional rights.

The federal circuits are sharply divided on the constitutionality of regulations pertaining to the length of the hair of male students in state public schools. The students have prevailed in the First and Seventh Circuits.

See Richards v. Thurston, 1 Cir., 424 F.2d 1281; Breen v. Kahl, 7 Cir., 419 F.2d 1034, cert. denied 398 U.S. 937; and Crews v. Cloncs, 7 Cir., 432 F.2d 1259. The school regulations were upheld in the Fifth, Sixth, and Ninth Circuits. See Stevenson v. Board of Education of Wheeler County, Georgia, 5 Cir., 426 F.2d 1154, cert. denied 400 U.S. 957; Ferrell v. Dallas Independent School District, 5 Cir., 392 F.2d 697, cert. denied 393 U.S. 856; Jackson v. Dorrier, 6 Cir., 424 F.2d 213, cert. denied 400 U.S. 850; Gfell v. Rickelman, 6 Cir., 441 F.2d 444; and King v. Saddleback Junior College, 9 Cir., ... F.2d ..... In Griffin v. Tatum, 5 Cir., 425 F.2d 201, the court held invalid that portion of a regulation which required that the back hair be tapered rather than blocked.

No apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies, the issue. The briefs and arguments for the students cavalierly dismiss, or entirely fail to discuss, the problem of federal intervention in the control of state schools in the absence of a direct and positive command stemming from the federal constitution. The hodgepodge of reference to many provisions of the Bill of Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right.

All of the briefs for the students rely on Tinker v.

Des Moines Independent Community School District, 393 U.S. 503, and Griswold v. Connecticut, 381 U.S. 479. Tinker was concerned with the suspension of three students for wearing to school black armbands to publicize their objection to Vietnam hostilities. The Court held that the conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The Court said that the wearing of armbands was closely akin to pure speech and that, 393 U.S. 507-508:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."

We believe that the effect of this statement is to eliminate hair style from any impact of the decision. The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card burning cases, United States v. O'Brien, 391 U.S. 367, 376:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Recognition of the principle that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, does not mean that the First Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area.

Griswold held that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. 381 U.S. at 481-486. We agree with the Ninth Circuit that the conduct controlled by the hair style regulation "is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others." King v. Saddleback Junior College, 9 Cir., ... F.2d ....., slip opinion p. 8 and authorities cited in note 11. A school regulation on the length of a student's hair is not comparable to a state statute regulating behavior in the privacy of a bedroom.

Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment. It was on this ground that the First Circuit held for the student in Richards v. Thurston, see 424 F.2d at 1284-1286, a case in which no justification was offered for the regulation. Reliance on justification carries with it the concept that a regulation affecting the due process guarantee of liberty depends for its validity on the reasonableness of the limitation placed on the regulated conduct. The evanescent nature of this standard is illustrated by the three cases before us. On unsurprisingly similar justifications two federal district courts upheld the regulations and one held to the contrary.

We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on

views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 372 U.S. 726, 730, the Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards. We do not read Griswold v. Connecticut as overruling Ferguson v. Skrupa. The Griswold decision turned on specific issues there presented. See 381 U.S. at 482.

The remedy provided by § 1983 is supplementary to any pertinent state remedy. See Monroe v. Pape, 365 U.S. 167, 183. The proliferation of litigation resulting from the expanded use of § 1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the § 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist "not in mere form but in substance, and not in mere assertion, but in essence and effect." Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388, 397.

The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. In speaking of judicial interposition in the operation of the public school systems, the Supreme Court said in Epperson v. Arkansas, 393 U.S. 97, 104:

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Whether the allegations of a complaint state a claim for relief is a question of law. Bell v. Hood, 327 U.S. 678, 682. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas. It follows that each of the complaints with which we are concerned should have been dismissed for failure to state a claim on which relief can be granted.

The judgments of dismissal in No. 71-1007, the Utah case, and in No. 71-1072, the Colorado case, are severally affirmed. In No. 71-1051, the New Mexico case, the judgment is reversed and the case remanded with directions to dismiss.

Opinion of the United States District Court for the District of Utah

UNITED STATES DISTRICT COURT

D. UTAH, N. D.

OCT. 2, 1970

Nos. NC 36-70, 37-70 and 249-70

BILLIE K. FREEMAN, Guardian of Terry Freeman,

Plaintiff,

v.

ALMON FLAKE, Principal of Viewmont High School, the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT, and IRVIN R. CLEVERLY, MORRIS HANSEN, HENRY E. PETERSON, LYNN W. BURTON, and HAROLD J. GAILEY, members of the Board of Education of Davis County School District, and BERNELL WRIGLEY, Superintendent of Davis County Schools,

Defendants.

VYRON RANDALL OSTLER, a minor, by Stephen B. Ostler, his father and natural guardian,

Plaintiff.

v.

BERNARD YOCUM, LAWRENCE L. COOK, LYNN WILCOX, and the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT,

Defendants.

MARK CHARLES SIMMONS, by and through his guardian Robert C. Simmons,

Plaintiff,

v.

CLIFTON PYNE, Principal of Orem High School, and the BOARD OF EDUCATION OF ALPINE SCHOOL DISTRICT, and DR. BOYD J. LARSEN, FRANK C. GREENWOOD, ELI C. CLAYSON, DR. R. PHIL SHUMWAY, HARVEY E. SMITH, members of the Board of Education of Alpine School District,

Defendants.

JAMES N. BARBER and RICHARD M. DAY, Salt Lake City, Utah, *for Terry Freeman and Mark Charles Simmons.*

FRANK S. WARNER, Ogden, Utah, *for Vyron Randall Ostler.*

FELSHAW KING, Clearfield, Utah, *for Almon Flake and others and Bernard Yocum and others.*

HARVARD R. HINTON, Lehi, Utah, *for Clifton Pyne and others.*

CHRISTENSEN, *District Judge.*

The above-entitled cases, consolidated for trial because they involve common questions of fact and law, present questions concerning the power of school boards in the State of Utah, and school officials acting under them, to promulgate and enforce regulations dealing with the length of hair of students and related matters of appearance and grooming.

In No. NC 36-70, Freeman v. Flake, plaintiff, represented by his mother as guardian, is a student in Viewmont High School, one of the schools maintained and administered by Davis County School District, State of Utah. It is alleged that on or about September 17, 1970, the defendant Principal suspended or expelled this student preventing him from attending further classes, all without justification, legal excuse or opportunity for hearing, but because of the refusal of Terry Freeman to comply with the defendants' orders or regulations relating to the length or style of students' hair.

In NC 37-70, Ostler v. Yocum, the plaintiff was enrolled as a student in Sunset Junior High School, one of the junior high schools maintained and administered by

the Board of Education of Davis County School District. It is alleged that on or about September 16, 1970, the defendant Yocum requested the vice-principal and the principal of this school to suspend or expel the plaintiff; and that the defendants have subsequently prevented plaintiff from entering or attending any classes at the Sunset Junior High School because of the plaintiff's refusal to comply with the defendants' orders or regulations relating to the length or style of hair.

In No. C 249-70, Simmons v. Pyne, similar allegations are made on behalf of Simmons.

The evidence shows that the students were suspended because of their refusal to comply with the regulations as to length of hair, that while Freeman was performing marginally otherwise, the suspension could not be justified on other grounds. Simmons and only to a lesser extent Ostler were considered good students aside from the problem involved here. The hair of all three was persistently maintained in a manner to clearly violate the requirements in question and abundant opportunity was afforded each to bring himself into compliance before the suspensions. Freeman and Ostler have the opportunity of keeping up their school work through home teachers provided by the defendants during their periods of suspension. Simmons has now had his hair cut sufficiently to bring him into compliance with the regulation and is in school without abandoning his contention that his future conduct will be unconstitutionally restricted unless the regulation is declared invalid. I do not think that the case is moot for this reason. Ostler is the only one who gave any reason other than general ones for his resistance to the rules, claiming that long hair was necessary

to cover a scar on his head. Personal inspection is convincing that the scar is covered equally well by length within the regulation. There is nothing in the evidence to suggest that this was his real reason for non-compliance or that if it was the school authorities would not permit any reasonable departure in view thereof.

Jurisdiction in each case here is claimed on the basis of 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1985, upon amendments I, IV, IX and XIV of the Constitution of the United States, and upon 28 U.S.C. §§ 2201, 2202. This court does have jurisdiction over the subject matter of the actions and the persons of the parties.

In the first two cases venue is appropriately laid in the Northern Division of the District of Utah; and upon consolidation the third case was transferred, with the consent of the parties and pursuant to the rule of court, for disposition in the Northern Division in connection with the prior cases.

The cases initially came before the court on applications for restraining orders and preliminary injunctions pendente lite; but by reason of the urgency of an early determination, and in order to avoid duplication by separate hearings with reference to preliminary injunctive relief and upon the final merits, the parties have stipulated and the court has approved the hearing of the cases upon their final merits at this time, there having been a waiver of time for pleading and pre-trial discovery and a stipulation that except as indicated otherwise in the evidence the complaints in the cases may be deemed denied by the respective defendants.

Evidence has been taken over a period of three

days; in addition pre-trial briefs and oral arguments of counsel have been considered. The court now considers itself fully advised and believes it essential in the public interest, for the welfare of the students directly involved and the student bodies of the schools generally to announce its decision without further delay.

Contending that each answer must be in the affirmative, the plaintiffs present the following questions for determination:

1. Whether requiring a student to conform to a regulation governing length or style of hair as a prerequisite to attending a public school violates his and his parents' fundamental rights of privacy guaranteed by the First Amendment and the "penumbra" of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Whether suspension or expulsion of a student from public school for wearing long hair denies him the freedom of expression guaranteed and protected by the First Amendment.

3. Whether suspension or expulsion of a student from public school for failure to comply with a regulation published or unpublished, governing the length or style of hair, violates the Due Process Clause of the Fourteenth Amendment.

4. Whether a regulation which prevents students from attending public schools solely because of the length of their hair is a violation of the Equal Protection Clause of the Fourteenth Amendment as an unreasonable classification.

5. Whether the regulation under which plaintiffs were suspended or expelled is unconstitutionally vague.

I have indulged a wide range of evidence in these cases to have assurance that no significant points are overlooked. The students involved and their witnesses, as well as the experts, have been permitted rather freely to express their opinions concerning the regulations in question, as well as general problems of student relationships and school administration.

With much of what has been said on behalf of each side, I can agree—the importance of individual liberty in schools as well as out, the requirement to observe constitutional limitations in school as well as out, the necessity of reasonable regulations to advance and to protect the learning process, the desirability of collaboration and mutual discussion in the formulation of school policies, the necessity or ultimate responsibility upon school administrators to administer and upon teachers to teach, the desirability that every student, without interference, receive in-school training with the maximum self-determination and liberty consistent with the functioning of a school, the learning process and the rights of others, and the necessity that those defying reasonable regulations not be permitted to break down school administration in perversion of their own attitudes and the destruction of a system indispensable to the discharge of the mission of the schools.

There is much in the testimony with which I do not agree. I cannot accept the contention that all people wearing long hair are mentally ill on the one hand, or on

the other that they are as a general rule more creative or scholarly than those who do not. I do not agree that the function of a school is necessarily to teach the philosophy of the majority of the patrons of school, much less the philosophy of a minority of the patrons or of those who have no connection with its problems. It is questionable that there is any inherent or necessary correlation between long hair and improper conduct. There is evidence indicating that long hair creates negative attitudes if not opposition from the majority of students, that those with long hair tend to isolate themselves from the main stream of student activity and that long hair in the climate of the time is disruptive within the schools in question of proper school discipline and the learning process to an extent.

The experts and the evidence in general are in substantial agreement that beyond whatever excessively long hair indicates about the personal attitude and mind of individuals it has become within the fabric of our society a symbol of dissatisfaction and protest to which a substantial number of people, for reasons sufficient to themselves, respond and with which young minds in the process of resistance to authority are likely to identify without any real ideological view except the testing of parental or school authority. There seems to be a correlation between long hair and improper grooming aside from hair.

There was a sharp difference of opinion as to the necessity or benefits of the regulations in question in these or other schools among the witnesses, but those directly connected with the schools and school districts in question were in substantial agreement that they were beneficial if not essential, and there is indication that

they have the broad support not only of the patrons and administrators but of the students therein.

It should be noted that in what has been said hereinbefore and in the discussion which follows the term "long hair" generally is used to refer to hair of a junior or senior high school male student permitted to grow substantially beyond the limits referred to in the regulation in question. That is not to say that hair within the limits may not be considered "long", depending upon the viewpoint. And I am impressed with the statement of one of the witnesses that between close shaven hair and the limits of the regulation there is a considerable leeway for individual taste (including what may be regarded by many as long hair for male students). And I must emphasize that anything which has been or will be said about "long hair" in no way is intended as a moral or ideological judgment. We are not concerned with any point except the right of junior or high school students to wear long hair beyond and in defiance of school regulations, and we are not concerned necessarily with this question in the abstract but with reference to the specific regulations involved here and under the circumstances shown by the evidence.

While the applications vary somewhat among the cases, the regulation of the Davis County School Board on the subject in question is characteristic and raises all of the issues with which we are concerned in these cases:

> "The Board of Education of the Davis County School District, in support of the aims of public education, recognizes that standards of proper dress and grooming seriously affect the behavior of stu-

dents attending school. Experience has demonstrated that the atmosphere for a good learning situation and a wholesome academic environment is improved when proper dress, proper grooming and when proper standards of decorum and discipline are adhered to by the studentbody. The Board of Education, therefore, strongly urges that every effort be made to promote and maintain such personal maturity and development.

"As a student seeks purposely to draw attention to himself through oddities of dress and styles, he is usually displaying a false sense of values and will, quite likely, not fulfill himself academically in his school and his studies. Furthermore, experience indicates that there are sanitation and safety factors directly related to proper dress and grooming. Furthermore, experience indicates there is a real and reasonable connection between proper dress and grooming and the successful operation of the educational system with the maintenance of school discipline. Therefore, the Board of Education of the Davis County School District sets the following standards for school dress and appearance:

"1. All students shall maintain their hair in a clean and well-washed manner and male students shall comb and wear their hair so that it does not hang below the collar line in the back nor hang over the ears on the side and their hair must be above the eyebrows in the front. Male students shall be clean shaven and their sideburns shall not be lower than the bottom of the ear and mustaches properly trimmed.

"2. All students shall be required to wear clean clothing and no immodest form or manner of dress shall be allowed. Shorts and other similar attire shall not be worn nor shall any clothing be worn which displays obscene or suggestive words or pictures nor shall any clothing be worn which is so extreme or odd that it may disrupt or tend to disrupt or interfere with school functions. School officials may require students to wear certain types of clothing for health or safety reasons in connection with certain specialized activities.

"If a student does not comply with these regulations upon direction of the principal, he may be suspended from school until such time as he does comply. Any student so suspended shall in any event be required to bring his parents or guardian to school for a conference with the principal before reinstatement at which time the principal may decide to reinstate the student or to continue the suspension.

"In the event the principal decides to continue the suspension after having met with the parents or guardian, the student, through his parents or guardian, shall have a right to appeal the decision of the principal to the Director of Pupil Personnel of the Davis County School District within Ten (10) days after the decision of the principal. The Director shall thereafter set a time for conducting a conference at which time the student, parents or guardian shall be given a hearing. At the conclusion of such informal hearing the Director shall either affirm the decision of the school principal or order the student reinstated.

"If the Director affirms the decision of the school principal, the student, through his parents or guardian, may appeal in writing to the Superintendent of Schools within Ten (10) days from the date of such decision. The Superintendent of Schools as the Executive Officer of the Board of Education shall thereafter review the decision of the Director of Pupil Personnel, with or without holding a hearing, and thereafter render a decision affirming the decision of the Director or ordering the student reinstated.

"At all times during the aforementioned appeal procedures, the student shall remain on suspension unless otherwise ordered by the Superintendent of Schools."

The Alpine School District Regulation is substantially the same with reference to length of hair, although varying in other respects. They were put in their present form shortly before the suspensions in question, but their content and substance have been in force and well understood over a substantial period of time theretofore.

There is no question of the statutory and inherent right of school boards within the State of Utah to promulgate and appropriately enforce reasonable regulations concerning the conduct, deportment, and grooming of students attending public schools placed under their administrative control, providing that such regulations do not offend rights guaranteed by the Constitution of the United States. Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963); Beard v. Board of Education, 81 Utah 51, 16

P.2d 900 (1932); Davis v. Ogden City, 117 Utah 315; 215 P.2d 616 (1950); State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959).

The point has been advanced, more by way of suggestion in the pleadings or in inferential argument rather than solidly set out, that some problem of procedural due process is involved. The evidence and the final statement of plaintiffs' counsel have set such point at rest, for it now seems clear that the students involved were well aware of the regulations, had been repeatedly admonished in view of them, had, with the knowledge and acquiescence, if not support, of their parents elected to defy them and had rejected the known and established sysetm of review through higher administrative authority. I do not believe that failure to exhaust administrative remedies would bar relief here under the civil rights acts but I am also of the opinion, confirmed by the statements of counsel, that procedural due process is not in issue.

Whatever uncertainty might exist concerning the term "proper grooming" in other respects, this is not involved in the present cases; becaues the school authorities acted upon the express requirements of length of hair, the validity of the regulations with respect thereto is the only point here.

I must reject the argument by counsel for one of the plaintiffs that the regulation is uncertain or overly broad. General reference to "proper grooming" is not in question now. Indeed, the regulation as to hair is explicit, and if there were any way to draw lines, the lines have been rather specifically drawn in language

that no student could misunderstand. And if a line is permissible some place, it seems that the line drawn of not below the collar, not over the eyes, or not over the ears, is as manageable and reasonable as any other having practical significance. Thus, I hold that the regulation is not void on its face for uncertainty or overbreadth and that we must look further into its nature and effect in order to determine its constitutionality.

Nor need we pause long at the contention that length of hair beyond the regulation is in itself a form of symbolic speech which with especial sensitivity beyond ordinary respect for constitutional limitations must be protected under the First Amendment. It is argued that such conduct, like words, can be an expression or dramatization of a moral, sociological, political, religious or idealogical viewpoint. However the argument may be sustained in another context, more is required here than counsel's suggestion that the plaintiffs perhaps were indicating a profound or hidden ideological view unknown even to themselves and thus that the right of symbolic free speech might be involved. The main reason assigned by the plaintiffs for resistance to the regulation was that they "wanted" to have longer hair, they "liked" it and they thought it was their "right".

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), does not suggest that this is "symbolic, free speech". On the contrary, this case states, among other things:

> "The problem posed by the present case does not relate to regulations of the lentgh of skirts or the type of clothing, to hair style, or deportment.

> Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 ([5th Cir.] 1968; Pugsly v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"

And in United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Supreme Court said:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

As noted by Judge Doyle in Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colo., 305 F.Supp. 1316, (D. Colo. 1969):

> "This does not mean though that conduct of the kind here in question does not have any constitutional protection. It is protected to the extent that the due process clause of the Fourteenth Amendment prohibits the arbitrary deprivation of liberty. This right is, however, both substantively and procedurally distinct from the paramount right to freedom of speech * * * Legislative power in this area is circumscribed to a much greater degree than in the area of conduct, and courts require that such a regulation is necessitated by a compelling state interest before its constitutionality will be sustained * * * On the other hand, the role of a federal court in reviewing claims that state regulations of liberty violate substantive due process is relatively narrow."

In Tinker v. Des Moines Sch. Dist., *supra*, neither the trial court nor the Supreme Court reached the question whether even in the sensitive free speech area a

regulation was justifiable in circumstances similar to the present ones before the court.

If we are to extrapolate a result from *Tinker* and the cases dealing more precisely with conduct as distinguished from speech, in the context of the evidence before this court, it would be that school board action reasonably designed to foster legitimate educational aims and to promote the learning process, order or safety of students will be sustained if not arbitrary or capricious. The state in the area of regulation of grooming and in connection with its broader but related functions is advancing a vital state interest. Those activities which have a disruptive effect on the learning atmosphere in public schools are not improper subjects for regulation.

The evidence in my opinion clearly shows that not only were he regulations with regard to hair length adopted after careful consideration and in the intended best interest of the educational process, but they were based upon reasonable findings supported by the evidence tending to indicate to the reasonable mind that such regulations would minimize disruption and distraction in the school, promote order and safety, redirect the attention of students from an obsession with, or reaction against, mere hair length—as an achievement or a counter-achievement—would direct attention to more productive activities, and would minimize the danger of distraction from educational pursuits. Others considering such evidence might come to a different conclusion but this does not destroy the underpinnings of the boards' determinations, since those boards, rather than others, are charged with the legal responsibility of adopting regulations consistent with constitutional

limitations and the dictates of reason. I reject any broad notion that within those limitations federal judges are established as overseers to regulate the exercise of state discretion as well as to see that constitutional limitations are not breached.

Under circumstances having some relationship to the present cases, many courts have sustained similar regulations. Leonard v. School Committee, 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192; Davis v. Firment, 269 F. Supp. 524, (D.C.La.), aff'd., 408 F.2d 1085 (5th Cir. 1967); Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Akin v. Board of Education of Riverside Unified School District, 262 Cal.App.2d 161, 68 Cal.Rptr. 557 (1968); Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colorado, 305 F.Supp. 1316 (D.C. Colo.1969); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Stevenson v. Wheeler County Board of Education, 426 F.2d 1154 (5th Cir. 1970); Neuhaus v. Torrey, 310 F.Supp. 192 (D.C.Cal.1970); Farrell v. Smith, 310 F.Supp. 732 (D.C.Maine 1970); Crews v. Clones, 303 F.Supp. 1370 (D.C.Ind.1969); Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570 (D.C.Tex 1970); Wood v. Alamo Height Independent School District, 308 F.Supp. 551 (D.C.Tex.1970); Christmas v. El Reno Board of Education, 313 F.Supp. 618 (D.C. Okl.1970); Other courts have reached contrary conclusions on facts which bear some similarity to the present cases. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268 (1970); Westley v. Rossi, 305 F.Supp. 706 (D.C.Minn.1969); Griffin v. Tatum, 300 F.Supp.

69 (D.C. Ala.1969), affd, in part, 425 F.2d 201 (5th Cir. 1970); Olff v. East Side Union High School District, 305 F.Supp. 557 (D.C.Cal.1969); Richards v. Thurston, 304 F.Supp. 449 (D.C.Mass.1969), affd., 424 F.2d 1281 (1st Cir. 1970); Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (D.C. Texas 1969); Lucia v. Duggan, 303 F.Supp. 112 (D.C.Mass. 1969); Finot v. Pasadena City Board of Education, 250 Cal. App.2d 189, 58 Cal.Rptr. 520 (1967). Counsel have not reported nor have I been able to find that either the United States Court of Appeals for the Tenth Circuit or the Supreme Court has yet ruled upon a case closely in point.

I am of the opinion that the line of authority first cited represents the best if not the majority view on the question.

I shall not attempt here to re-examine beyond what I have said the detail of reason going into the cited cases, I conclude in view of my evaluation of those reasons, the evidence before the court, and the controlling principles of law, that the enforcement of the regulations by suspension pending compliance in the context of these cases does not violate either the students' or the parents' fundamental rights of privacy, does not deny freedom of expression guaranteed and protected by the First Amendment, does not violate either procedural or substantive due process or the equal protection clause of the Fourteenth Amendment, that the regulations are not unconstitutionally vague, or overly broad, and that there is no basis for enjoining their application and enforcement in the schools involved here under existing circumstances.

Wherefore, this opinion being deemed sufficient as findings of fact and conclusions of law, pursuant to the requirements of Rule 52, F.R.C.P., it is now ordered that injunctive relief should be, and it is hereby, denied, and the actions of the plaintiffs dismissed, without costs.